In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 478.

WEST POINT WHOLESALE GROCERY COMPANY,
Appellant,

vs.

THE CITY OF OPELIKA, ALABAMA,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF ALABAMA.

BRIEF ON THE MERITS.

M. R. SCHLESINGER,
1700 N. B. C. Building,
Cleveland, Ohio,
Attorney for Appellant.

Of Counsel:

N. D. DENSON,
Opelika, Alabama,

TOM B. SLADE,
Columbus, Georgia.

TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

Constitution.

Statute.

Ordinances of the City of Opelika, Alabama.

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 478.

WEST POINT WHOLESALE GROCERY COMPANY,

Appellant,

vs.

THE CITY OF OPELIKA, ALABAMA,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF ALABAMA.

BRIEF ON THE MERITS.

CASE REPORTED BELOW.

The Court of Appeals of Alabama is the only lower court which has written an opinion in this case. *West Point Wholesale Grocery Company v. The City of Opelika*, 87 So. 2d 661 (Ala. 1956).

STATEMENT OF JURISDICTIONAL GROUNDS.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. A. § 1257(2) (1946). The appellant herein filed a complaint against the City of Opelika, Alabama, attacking the validity of a city ordinance on the grounds that, as applied to appellant, the ordinance was repugnant to both the Federal and Alabama Constitutions. The Trial Court sustained a demurrer to the complaint and a non-suit was entered. The Alabama Court of Appeals affirmed.

This appeal is from the decision of the Alabama Court of Appeals which was rendered on February 21, 1956. A rehearing was denied by the Alabama Court of Appeals on April 3, 1956, and within the time permitted by Alabama law appellant petitioned for a writ of certiorari to the Supreme Court of Alabama. The Supreme Court of Alabama denied the writ of certiorari and dismissed the petition on May 24, 1956. A notice of appeal to this Court was filed by appellant with the Clerk of the Court of Appeals of Alabama on August 9, 1956.

Probable jurisdiction was noted by this Court on December 3, 1956, and the case was transferred to the summary docket.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED.

1. Ordinances of the City of Opelika, Alabama.

Section 130(a) of The City of Opelika, Alabama, Ordinance No. 101-53 as amended by Ordinance No. 103-53 is the ordinance which, as applied to appellant for the year 1953, is attacked as being repugnant to the Commerce Clause of the United States Constitution. Ordinance No. 101-53 as amended by Ordinance No. 103-53 reads in part as follows:

> "Be It Ordained by the Board of Commissioners of the City of Opelika, Alabama, that the following schedule of rates for license or privilege taxes for the conduct of any trade, vocation, profession or other business conducted within the City of Opelika, and its police jurisdiction for the year beginning January 1, 1953, and ending December 31, 1953 and the following conditions and provisions for the conduct thereof, and the following penalties for the violation thereof, be and it is hereby adopted."

* * * * *

"Section 130(a) TRANSIENT OR ITINERANT WHOLESALE GROCERS:

Each person, firm or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only $250.00"

Attached hereto as Appendix "A" are sections d, 82, and 130(a) of Ordinance No. 101-53 as amended by Ordinance No. 103-53. Although sections d and 82 are not directly attacked in this appeal, reference must be made to them for a complete consideration of the issues. Section d provides penalties for non-compliance with the ordinance. Section 82 provides for the taxation of local Opelika wholesale merchants.

2. Provisions of the United States Constitution.

Article I, Section 8, of the United States Constitution provides in part as follows:

"The Congress shall have Power * * * (3) to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *."

The 14th Amendment to the United States Constitution provides in part as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

1. Whether Section 130(a) of Ordinance No. 101-53 as amended by Ordinance No. 103-53 of the City of Opelika, Alabama, levying a $250.00 annual flat sum license tax for 1953 upon each person, firm or corporation which unloaded or delivered groceries at wholesale in the City of Opelika, Alabama, which groceries were transported in uninterrupted interstate commerce from a point without Opelika, violated the Commerce Clause of the United States Constitution (U. S. Const. Art. I, § 8, cl. 3), and the Equal Protection and Due Process Clauses of the United States Constitution (U. S. Const. Amend. XIV, § 1) as applied to appellant for the reason that any flat sum license tax as so applied is invalid.

2. Whether the above Section 130(a) as so applied violated the said Commerce, Equal Protection and Due Process Clauses, particularly since another provision of the same Ordinance (being section 82 thereof) levied an annual license tax upon each wholesale merchant which unloaded or delivered groceries at wholesale in the City of Opelika, Alabama, which groceries were transported from a point within Opelika, at a graduated amount apportioned according to the gross receipts derived from such merchant's business.

STATEMENT OF THE CASE.

This is a suit brought against the City of Opelika, Alabama, to recover monies paid to the City pursuant to the provisions of Section 130(a) of Ordinance No. 101-53 as amended by Ordinance No. 103-53 on the ground that Section 130(a) is in conflict with the United States Constitution. Appellant was required to pay the flat sum license tax levied by this section under penalty of being adjudged in violation of the law and subject to a fine and imprisonment as is provided in Section d of Ordinance 101-53 (App. "A").

Without filing an answer or other responsive pleading the appellee demurred to the complaint, which demurrer was sustained, and successive appeals have brought this case to the United States Supreme Court.

By demurring to the complaint appellee has admitted the truth of all well pleaded facts. *Long v. Long*, 255 Ala. 353, 51 So. 2d 533 (1951); *Watkins v. Reinhart*, 243 Ala. 243, 9 So. 2d 113 (1942); *Montgomery v. Smith*, 226 Ala. 91, 145 So. 822 (1933); *Hanover Fire Insurance Co. v. Street*, 228 Ala. 677, 154 So. 816 (1934). Accordingly, all of the facts relevant to this appeal are stated in appellant's complaint filed in the Trial Court (R. 1).

The complaint states, among other things, that during all of 1953 appellant was "a non-resident of the State of Alabama, being a corporation organized and existing under the laws of the State of Georgia and was, during said time, engaged in the wholesale grocery business, and from time to time, during said period, sold and delivered in interstate commerce certain of its groceries to retail merchants, located and doing business in said City of Opelika, that plaintiff had no office, storeroom or place of business whatsoever within the State of Alabama, that plaintiff had

no inventory or store of goods within the State of Alabama for the purpose of making deliveries in the State of Alabama or for any other purpose, but that such sales were purely interstate sales made upon orders given to plaintiff's salesman and representative upon his solicitation of such orders from said retail merchants, which orders were transmitted or delivered by said salesman or representative to plaintiff, at its place of business in the City of West Point, in the State of Georgia, where the orders were accepted, whereupon the groceries so ordered were loaded upon plaintiff's trucks at its place of business in said City of West Point in the State of Georgia, and unloaded at said retail merchants' places of business at the end of a continuous movement in interstate commerce from plaintiff's said place of business in the State of Georgia to the purchasers' place of business in the City of Opelika" (R. 1).

Thus, appellant, a corporation of a State other than Alabama, had absolutely no contact with Opelika, Alabama other than the solicitation of orders in Opelika through salesmen or representatives, and the transportation of groceries in continuous interstate journeys from outside Alabama to Opelika, Alabama. The decision below in this case subjects appellant, by reason of such interstate activities, to a flat sum license tax.

It is significant also that under Section 82 of the Ordinance merchants who dispose of groceries at wholesale in Opelika, which groceries were transported from a point **within** Opelika, are not subject to the flat sum of $250.00 license tax imposed on appellant. Their tax is graduated according to gross receipts derived from such merchants' business (App. "A").

SUMMARY OF ARGUMENT.

The Opelika taxing ordinance under review—Section 130(a) of Ordinance No. 101-53 as amended by Ordinance No. 103-53—is invalid as applied against the appellant for the year 1953 for both of the two following reasons:

1. It is a flat sum license tax imposed by a municipality on interstate commerce and therefore necessarily discriminates in operation against interstate commerce. This Court, in the long line of so-called 'drummer cases' headed by *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887), and most recently reiterated in *Nippert v. City of Richmond*, 327 U. S. 416 (1946), and in *Memphis Steam Laundry Cleaners, Inc. v. Stone*, 342 U. S. 389 (1952), has consistently held such flat sum license taxes to be a discriminatory, and therefore unconstitutional, burden on interstate commerce.

2. Quite apart from the fact that any flat sum license tax as applied to interstate commerce is invalid, the Opelika Ordinance is invalid for a second reason: it is discriminatory on its face because local wholesale merchants are subject to a license tax graduated according to gross receipts and not to a flat sum license tax. Thus the Ordinance imposes on appellant, a Georgia corporation engaged solely in interstate commerce in Opelika, Alabama, a kind of tax and an amount of tax which is far more onerous than the tax imposed on appellant's local competitors. This Court has stated clearly and forcefully, in the *Memphis Steam Laundry Cleaners, Inc.*, case, *cit. supra*, and in *Best & Company v. Maxwell*, 311 U. S. 454 (1940), that such a discriminatory tax is an unconstitutional burden on interstate commerce.

ARGUMENT.

THE OPELIKA TAXING ORDINANCE UNDER REVIEW IS INVALID AS APPLIED TO APPELLANT BECAUSE IT IS A FLAT SUM LICENSE TAX IMPOSED UPON INTERSTATE COMMERCE AND IS THEREFORE DISCRIMINATORY IN ITS OPERATION; FURTHERMORE, IT IS DISCRIMINATORY ON ITS FACE SINCE LOCAL WHOLESALE GROCERS ARE TAXED IN A DIFFERENT MANNER AND AT A DIFFERENT RATE FROM NON-LOCAL WHOLESALE GROCERS.

I. The Opelika Taxing Ordinance Under Review is Invalid as Applied to Appellant Because it is a Flat Sum License Tax Imposed Upon Interstate Commerce and is Therefore Necessarily Discriminatory Against Interstate Commerce.

The Opelika Taxing Ordinance under review as applied to appellant is a fixed-sum license tax imposed by a municipality on interstate commerce. As such it is precisely the kind of unwarranted burden on interstate commerce which has been consistently condemned by this Court as being an unconstitutional discrimination against interstate commerce. *Nipperi v. City of Richmond*, 327 U. S. 416 (1946); *Memphis Steam Laundry Cleaners Inc. v. Stone*, 342 U. S. 389 (1952); *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887).*

This Court has on numerous occasions pointed out the stultifying effect on interstate commerce which would obtain if States and municipalities were permitted to levy on interstate commerce the type of license tax here imposed. If Opelika could validly impose a flat sum license

---

* The *Robbins* case began a long line of cases—the so-called 'drummer' cases—which have consistently invalidated such flat sum license taxes on interstate commerce. In the interest of relative brevity, the appellant has not burdened this brief with the citation of those authorities but has referred only to the most recent decisions.

tax on appellant for the privilege of delivering goods in interstate commerce, each State, and what is far worse, each municipality, in which appellant sought to deliver wholesale groceries could impose a like tax. The aggregate burden of such taxes would be prohibitive. While the merchants of a particular community might temporarily benefit by such exclusionary taxes, the economy of the nation would almost certainly stagnate. Because of such potentially dire effects to the nation's economy, this Court has consistently held that all flat sum license taxes are discriminatory in operation against interstate commerce and violative of the Commerce Clause of the United States Constitution.*

Indeed, the wisdom of this Court's consistent rulings invalidating such flat sum license taxes on interstate commerce cannot be seriously questioned at this late date. This Court has spoken decisively and repeatedly.

In *Nippert v. City of Richmond*, 327 U. S. 416 (1946), the appellant was convicted and fined for failing to procure

---

* Any flat sum license tax attempted to be imposed by a State or municipality on interstate commerce is unconstitutional, even though the statute or ordinance purports to tax merchants who do a strictly local business at the same rate as merchants who are engaged in interstate commerce. *Nippert v. City of Richmond*, 327 U. S. 416 (1946). The reason, of course, is that the interstate merchant could be subject to hundreds, or indeed thousands, of such flat sum license taxes and, accordingly, the flat sum license tax is in actual operation discriminatory against the interstate merchant. Where the license tax imposed upon the interstate merchant is also discriminatory on its face against the interstate merchant (that is, where the tax imposed on the interstate merchant is higher than the tax imposed on similar merchants who do simply a local business), then the tax is unconstitutional on two separate grounds. The relevant Opelika ordinance as applied to appellant is invalid on both such grounds. It is a flat sum license tax and therefore discriminatory in its operation (subdivision I. of this Argument); it is also discriminatory on its face (subdivision II. of this Argument, beginning at page 14).

a license under a City of Richmond ordinance which levied upon all solicitors a $50.00 flat sum tax plus a percentage of gross earnings. On appeal to this Court, the conviction was reversed because of the unconstitutionality of the ordinance. The Court in this case made it clear that any flat-sum license tax levied on interstate commerce necessarily discriminates against interstate commerce, that such a tax imposes substantial excluding effects on interstate commerce and that the potential excluding effects of such a tax are greatly multiplied when it is recalled that the tax is levied by a municipality and not a state. This Court concluded its opinion by stating as follows (p. 434):

> "The tax here in question inherently involves too many probabilities, and we think actualities, for exclusion of or discrimination against interstate commerce, in favor of local competing business, to be sustained in any application substantially similar to the present one. Whether or not it was so intended, those are its necessary effects. Indeed, in view of that fact and others of common knowledge, we cannot be unmindful, as our predecessors were not when they struck down the drummer taxes, that these ordinances lend themselves peculiarly to creating those very consequences or that in fact this is often if not always the object of the local commercial influences which induce their adoption. Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against."

The *Nippert* case is on all fours with the instant case, except in one respect in which this appellant is immeasurably stronger. In *Nippert*, the tax involved was a municipal tax; so also is the tax imposed by Opelika, Alabama.

in the instant case. In *Nippert*, the tax involved was a flat sum license tax required to be paid in advance by a person who was soliciting interstate sales; in the instant case, Opelika requires a flat sum license tax to be paid in advance by appellant who engages in interstate commerce. In *Nippert*, the appellant was required to pay a fixed sum whether she solicited $1.00 of sales or $1,000,000 of sales in the City of Richmond; so also in the instant case, the appellant was required to pay a fixed sum whether it delivered $1.00 or $1,000,000 of merchandise in Opelika. This Court held that the Richmond ordinance was unconstitutional as applied to interstate commerce; it necessarily follows that the Opelika ordinance under review is unconstitutional as applied to appellant.

Indeed, the facts involved in the *Nippert* case were in one respect weaker for the appellant than are the facts in the instant case. In *Nippert*, the flat sum license tax was equally applicable to all solicitors, whether engaged in purely a local business or whether engaged in interstate commerce. The Richmond ordinance there involved was therefore not discriminatory on its face, although it was of course discriminatory in its actual operation. On the contrary, however, in the instant case, the Opelika tax is not only discriminatory in its actual operation, but, as we shall discuss in more detail in subdivision **II.** of this Argument, it is also discriminatory on its face. The Richmond ordinance was only once-condemned; the Opelika ordinance is twice-condemned.

In the recent case of *Memphis Steam Laundry Cleaners, Inc. v. Stone*, 342 U. S. 389 (1952), this Court again invalidated a flat sum license tax imposed on interstate commerce. The State of Mississippi levied a $50.00 flat sum license tax on the solicitation of business for a laundry not

licensed in the State of Mississippi. The appellant in that case operated a laundry in Memphis, Tennessee, sending its trucks into eight Mississippi counties to pick up, deliver, and collect laundry, and to seek new customers. The Court invalidated the Mississippi statute on the ground that the solicitation of interstate business was such an integral part of interstate commerce that a tax upon it "stands on no better footing than a tax upon the privilege of doing interstate business." (p. 393.)

In view of the decision in the *Memphis Steam Laundry Cleaners, Inc.* case, there can be no doubt that the ordinance attacked in this appeal is in conflict with the Commerce Clause. The tax levied by Mississippi was a flat sum license tax required to be paid in advance by persons engaged in the solicitation of interstate business. In the instant case, Opelika requires appellant to pay a flat sum license tax for the privilege of delivering goods in interstate commerce. In the *Memphis Steam Laundry* case, the tax bore no relation to the amount of business solicited. The Opelika tax also bears no relation to the amount of business done by appellant in that City. In the *Memphis Steam Laundry* case, the tax was an advance toll required to be paid upon entrance into the market and before the taxpayer could evaluate the market's potentialities. The same holds true in the instant case. The Opelika tax was required to be paid upon the appellant's entrance into the Opelika market and before appellant could adequately appraise the market to determine whether the payment of the tax was commensurate with the amount of business it could expect to realize from its potential Opelika customers.

Indeed, the flat sum license tax which was declared unconstitutional in the *Memphis* case was a far less onerous

burden on interstate commerce than is the Opelika tax involved in the instant case. In the *Memphis* case, the tax involved was a **state** tax, whereas the tax involved in the instant case is a **municipal** tax. This Court held the state-imposed tax in *Memphis* to be unconstitutional because that tax, with its threat of multiple burdens, necessarily discriminated against interstate commerce. To a far greater extent does the municipally-imposed tax involved in the instant case discriminate against interstate commerce. This proposition was strongly emphasized in *Nippert v. City of Richmond*, 327 U. S. 416 (1946) when the Court stated (p. 429):

> "The potential excluding effects for itinerant salesmen become more apparent when the consequences of increasing the amount of the tax are considered, *Cf. McGoldrick v. Berwind-White Co., supra*, at 58, and they are magnified many times by recalling that the tax is a municipal tax not one imposed by the state legislature for uniform application throughout the state. * * *
>
> "But the cumulative effect, practically speaking, of flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town is obviously greater than that of any tax of statewide application likely to be laid by the legislature itself. And it is almost as obvious that the cumulative burden will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the State or the salesman who operates within a single community or only a few."

If Opelika could validly impose a flat sum license tax on appellant for the privilege of doing interstate business, so also could every other municipality in the nation. The effect on the nation's economy would be disastrous. It follows with even greater force than in the *Memphis*

case that the Opelika tax under review can not constitutionally be exacted of appellant.

Based upon both reason and the precedent established by the *Nippert* and *Memphis Steam Laundry Cleaners* cases, as well as many other decisions of this Court, it is clear that Section 130(a) of the Opelika privilege tax ordinance is an undue burden on interstate commerce and must be invalidated as being in conflict with the Commerce Clause.

II. The Opelika Ordinance is Unconstitutional for the Further Reason That it is Discriminatory on its Face Since Local Wholesale Grocers are Taxed in a Different Manner and at a Different Rate From Non-Local Wholesale Grocers.

The Opelika taxing ordinance under review is unconstitutional as applied to appellant because it is a flat sum license tax imposed by a municipality on interstate commerce. This Court, beginning with its decision in *Robbins v. Shelby County Taxing District* and extending down to the recent *Nippert* and *Memphis Steam Laundry* cases (which latter two cases are discussed in some detail in subdivision I. above), has consistently invalidated such taxes whether or not the taxing statute or ordinance discriminates on its face between merchants engaged in interstate commerce and merchants engaged solely in a local business.

In point of fact, however, the Opelika ordinance under review is unconstitutional as applied to appellant not only because it necessarily discriminates in its operation against interstate commerce (it being a flat sum license tax); it is unconstitutional on wholly separate grounds because it is discriminatory on its face. The appellant, a

Georgia corporation which is engaged in the wholesale grocery business and which does solely an interstate business in Opelika, Alabama, was required to pay in advance a flat sum license tax of $250.00 in order to carry on its interstate business in Opelika for the year 1953. A strictly local competitor of appellant would have paid for the same year a tax proportioned to the gross volume of sales effected by it in that year and would have paid that tax, not prior to conducting any local business (as did the appellant), but only after the close of the year. A strictly local competitor of appellant would have had to gross the astronomical amount of $280,000.00 in sales in 1953 in order to be required to pay the same tax which appellant had to pay before it could even set foot in Opelika. (Cf. section 82 with section 130(a) of Opelika Ordinance No. 101-53 as amended by Ordinance No. 103-53. Appendix A.) The discrimination against non-local wholesale grocers (in our case, against a Georgia corporation doing solely an interstate business in Opelika) is apparent on the very face of the relevant ordinances. This Court has consistently declared unconstitutional license taxes which on their face discriminate between resident and non-resident merchants.

In the *Memphis Steam Laundry* case this Court decided two alternative issues. This Court first assumed that the relevant tax was a flat sum license tax imposed on the solicitation of sales in interstate commerce; on that assumption, it invalidated the tax because it was a flat sum license tax on interstate commerce and therefore it necessarily discriminated against interstate commerce.*

---

* This Court's decision on the first alternative issue presented in *Memphis Steam Laundry* is discussed in subdivision **I.** of this brief.

This Court then made the alternative assumption that the tax was imposed on the privilege of doing a strictly intrastate business. Even under that alternative assumption, this Court invalidated the tax as applied to the appellant because the tax to be paid by out-of-state laundries was greater than the tax to be paid by resident laundries. In that connection this Court stated (p. 393):

> "On the assumption that the tax is imposed upon appellant's Mississippi activities of picking up and delivering laundry and cleaning, the 'peddler' cases are invoked in support of the tax. Under that line of decisions, this Court has sustained state taxation upon itinerant hawkers and peddlers on the ground that the local sale and delivery of goods is an essentially intrastate process whether a retailer operates from a fixed location or from a wagon. However, assuming for the purposes of this case that Mississippi imposes its $50.00 per truck tax only upon the privilege of conducting intrastate activities, the tax must be held invalid as one discriminating against interstate commerce.
>
> "The $50.00 per truck tax is applicable only to vehicles used by a person 'soliciting business for a laundry **not licensed in this state as such.**' Laundries licensed in Mississippi pay a fixed fee to the municipality in which located, plus a tax of $8.00 per truck upon each truck used in other municipalities * * * The 'peddler' cases are inapposite under such a showing of discrimination since they support state taxation only where no discrimination against interstate commerce appears either upon the face of the tax laws or in their practical operation." (Emphasis supplied.)

The facts in the instant case are far stronger for the conclusion that the relevant ordinance is unconstitutional as applied to appellant than were the facts in *Memphis Steam Laundry*. In the *Memphis Steam Laundry* case,

this Court held that the discriminatory rate structure invalidated the relevant ordinance even on the assumption that it was being applied to a non-resident appellant **who was doing an intrastate business in Mississippi.** In the instant case, the appellant's activities in Opelika clearly constitute the conduct of interstate commerce. If a tax rate structure which discriminates against an out-of-state merchant who does an intrastate business is unconstitutional, it follows with even greater force that a tax rate structure is unconstitutional which discriminates against an out-of-state merchant who does solely an interstate business. Accordingly, it follows even more clearly than in the *Memphis Steam Laundry* case that the discriminatory rate structure of the Opelika ordinances invalidates the relevant ordinance as applied against the appellant.

In *Best & Company Inc. v. Maxwell*, 311 U. S. 454 (1940), North Carolina imposed an annual privilege tax of $250.00 on anyone not a regular retail merchant in the state who displayed samples in any hotel room or house rented or occupied temporarily for the purpose of securing retail orders. The only corresponding fixed-sum license tax exacted of regular retail merchants in North Carolina was one dollar a year for the privilege of doing business. This Court held that the statute was unconstitutional as applied to an out-of-state merchant because the rate structure discriminated against interstate commerce. This Court stated as follows (p. 455):

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. This stand we think condemns the tax at bar. Nomi-

nally the statute taxes all who are not regular retail merchants in North Carolina, regardless of whether they are residents or non-residents. We must assume, however, on this record that those North Carolina residents competing with appellant for the sale of similar merchandise will normally be regular retail merchants. The retail stores of the state are the material outlets for merchandise, not those who sell only by sample. Some of these local shops may, like appellant, rent temporary display rooms in sections of North Carolina where they have no permanent store, but even these escape the tax at bar because the location of their central retail store somewhere within the state will qualify them as 'regular retail merchants in the State of North Carolina.' The only corresponding fixed-sum license tax to which appellant's real competitors are subject is a tax of $1 per annum for the privilege of doing business. Non-residents wishing to display their wares must either establish themselves as regular North Carolina retail merchants at prohibitive expense, or else pay this **$250 tax that bears no relation to actual or probable sales** but must be paid in advance no matter how small the sales turn out to be. Interstate commerce can hardly survive in so hostile an atmosphere. **A $250 investment in advance, required of out-of-state retailers but not of their real local competitors, can operate only to discourage and hinder the appearance of interstate commerce in the North Carolina retail market.** Extrastate merchants would be compelled to turn over their North Carolina trade to regular local merchants selling by sample. North Carolina regular retail merchants would benefit, but to the same extent the commerce of the Nation would suffer discrimination." (Emphasis supplied.)

In *Best & Company*, this Court declared unconstitutional a statute which, as applied to the appellant in that case, required a non-resident merchant to pay a flat sum

license tax of $250, while local competitors had to pay only one dollar per year for the privilege of doing business. In the instant case, appellant was required to pay in advance a flat sum license tax of $250 regardless of whether or not it would make substantial deliveries in Opelika; appellant's local competitors, by contrast, were required to pay a tax based only on gross receipts and the amount of that tax would in all probability be only a small fraction of the amount required to be paid in advance by appellant. The Opelika ordinance under review is clearly discriminatory on its face as applied against appellant.

CONCLUSION.

The decision below sustaining the validity of Section 130(a) should not be permitted to stand in open defiance of the existing pronouncements of this Court. This tax affects not only appellant but all other wholesale grocers who dispose of goods within Opelika from a point without Opelika. If the decision below stands unchallenged an open invitation is extended to every other municipality in Alabama and for that matter every municipality in the United States to impose a flat sum license tax on interstate commerce—a tax which would be doubly reprehensible if, as in the instant case, the municipality taxed local merchants in a different manner and at a different rate from that imposed on out-of-state merchants. To permit such a practice would completely throttle interstate commerce in favor of local interests and create an area within which a local businessman could exert complete monopolistic control to the exclusion of out-of-state dealers.

For all of the above reasons, appellant respectfully requests this Court to reverse the judgment of the Alabama Court of Appeals and to remand the case to the Lee

Circuit Court of Alabama with instructions that the demurrer to the appellant's complaint be overruled, and to direct the Lee Circuit Court of Alabama to proceed to dispose of the case on the merits in accordance with law and the dictates of the United States Constitution.

Respectfully submitted,

M. R. SCHLESINGER,

Attorney for Appellant.

Of Counsel:

N. D. DENSON,

Opelika, Alabama,

TOM B. SLADE,

Columbus, Georgia.

APPENDIX "A."

EXCERPTS FROM CITY OF OPELIKA LICENSE SCHEDULE.

Ordinance No. 101-53 as amended by Ordinance No. 103-53.

"Be It Ordained by the Board of Commissioners of the City of Opelika, Alabama, that the following schedule of rates for license or privilege taxes for the conduct of any trade, vocation, profession or other business conducted within the City of Opelika, and its police jurisdiction for the year beginning January 1, 1953, and ending December 31, 1953, and the following conditions and provisions for the conduct thereof, and the following penalties for the violation thereof be and it is hereby adopted."

* * * * *

§ d. PENALTIES:

It shall be unlawful for any person, firm or corporation or agent of such person, firm or corporation, to engage in any of the businesses or vocations for which a license may be required without first having procured a license therefor, and any violation hereof shall constitute a criminal offense and shall be punishable by fine not to exceed one hundred ($100.00) dollars for each offense and by imprisonment not to exceed thirty days and not less than the amount of the licenses, either or both at the discretion of the Court trying the same, and each day when such business or vocation is conducted without such license shall constitute a separate offense.

* * * * *

§ 82. MERCHANT, WHOLESALE:

Where a gross annual business is:

$100,000.00 and less	$35.00
Over $100,000.00 and less than $200,000.00	$50.00
$200,000.00 and less than $500,000.00	$75.00
$500,000.00 and less than $1,000,000.00	$100.00
$1,000,000.00 and less than $2,000,000.00	$200.00
$2,000,000.00 and over	$250.00

And in addition thereto, one-sixteenth (1/16) of one percent (1/16%) on the first $500,000.00 gross receipts, plus one-twentieth (1/20) of one percent (1/20%) on the next $500,000.00 gross receipts plus one-fortieth (1/40) of one percent (1/40%) on all gross receipts over one million dollars ($1,000,000.00).

* * * * *

§ 130(a). TRANSIENT OR ITINERANT WHOLESALE GROCERS:

Each person, firm or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama which are transported from a point without the City of Opelika, Alabama to a point within the City of Opelika, Alabama, Annual only $250.00.